Fulton Bellows & Components, Inc. and its Trustee in Bankruptcy, Ann Mostoller *and* International Association of Machinists and Aerospace Workers, AFL–CIO *and* United Steelworkers of America, District 9. Cases 10–CA–34295 and 10–CA–34301.

November 8, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The General Counsel seeks default judgment in this case on the ground that the Respondent has failed to file an answer to the consolidated complaint. Upon a charge filed by International Association of Machinists and Aerospace Workers, AFL–CIO on March 11, 2003, and a charge filed by United Steelworkers of America, District 9 on March 17, 2003, the General Counsel issued a consolidated complaint on March 31, 2005 against Fulton Bellows and Components, Inc., and Ann Mostoller, its Trustee in Bankruptcy, collectively the Respondent, alleging that it has violated Section 8(a)(1) and (5) and 8(d) of the Act. The Respondent failed to file an answer.

On May 5, 2005, the General Counsel filed a Motion for Default Judgment with the Board. On May 11, 2005, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response.

The former counsel of the Respondent filed a special appearance and response to the notice to show cause. Former counsel represents that the Respondent has filed for bankruptcy, its assets have been sold, it no longer employs any employees, and that the case should be closed administratively because further proceedings could not result in an effective remedy. In addition, former counsel argues that the alleged unfair labor practices were the subject of an arbitration proceeding decided in the Respondent's favor and that the General Counsel erred in failing to defer to the arbitrator's ruling pursuant to *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984).[1] Former counsel also asserts that the Bankruptcy Trustee is not an employer under Section 2(2) of the Act and has no obligation to respond, citing *San Bernadino Dental Group*, 302 NLRB 135 (1991).

According to the General Counsel's brief in response, the Respondent ceased to exist as an employing entity of the unit employees on August 3, 2003 but continues to exist as an entity for the remedial purposes of the National Labor Relations Act and the Bankruptcy Code. In addition, the General Counsel disputes former counsel's contention that Spielberg/Olin deferral was appropriate here and notes that the Respondent has not argued for deferral. The General Counsel asserts that the Board has authority to proceed against the Respondent and the Bankruptcy trustee under the circumstances of this case, and that the question of whether assets will be available to remedy an unfair labor practice finding is an issue yet to be determined by the Bankruptcy court.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted.

As noted above, there was no answer filed by anyone as to the complaint. A response to the Notice to Show Cause was filed by *former* counsel to the Respondent. However, neither the Respondent nor any current counsel has filed a response. Consequently, we treat this case as one in which there has been no Respondent response to the General Counsel's complaint or the Motion. Accordingly, we grant that Motion.[2]

We appreciate the efforts of former counsel to Respondent to bring certain matters to our attention. However, in the absence of any indication that they reflect the position of the Respondent, we think that it is unwarranted to rely on such arguments as a basis for denial of the General Counsel's otherwise unopposed motion.[3]

[1] In further support of this contention, former counsel subsequently submitted a notice of supplemental authority drawing the Board's attention to its recent decision in *Smurfit-Stone Container Corp.*, 344 NLRB No. 82 (2005).

[2] However, because one of former counsel's contentions involved the issue of Board jurisdiction, and because the General Counsel himself dealt with that issue, we shall address it. Based on the General Counsel's Motion, it is apparent that the Respondent is currently subject to Chapter 7 proceedings in bankruptcy. The institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. See *Cardinal Services*, 295 NLRB 933 fn. 2 (1989), and cases cited there. Board proceedings fall within the exception to the automatic stay provisions of the bankruptcy code for proceedings by a governmental unit to enforce its police or regulatory powers. See id., and cases cited therein; *NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992). Accord: *Aherns Aircraft, Inc. v. NLRB*, 703 F.2d 23 (1st Cir. 1983).

[3] In Member Schaumber's view, the assertion by former counsel to the Respondent that there may be no assets to satisfy the remedy pro-

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware Corporation, had an office in Knoxville, Tennessee, where it engaged in the manufacture of metal, hydro formed, and welded bellows and assemblies for industrial customers. During the 12-month period preceding August 3, 2004, a representative period, the Respondent, in conducting its business operations, derived gross revenues in excess of $500,000, and shipped in interstate commerce from its Knoxville, Tennessee facility, products, goods, and materials valued in excess of $50,000 directly to points located outside the State of Tennessee.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that International Association of Machinists and Aerospace Workers, Local Lodge 555 (Machinists Union), and United Steelworkers of America, Local Lodge 5341(Steelworkers Union) are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Tool and Die Makers, Model and Instrument Makers, Precision Machinists, Machinists, Tool and Die Grinders, Hydraulic Plate Makers, Instrument Men, Maintenance Mechanic-Electricians, Maintenance Mechanic-Plumbers, Maintenance Mechanic-Welders, Maintenance Mechanic-Electricians and Lubricators, Apprentices, and Systems Maintenance Mechanics.

At all material times, the Machinists Union, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative of the unit described above. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms from October 26, 1999 to October 25, 2004.

All of the Respondent's employees described within and covered by the collective-bargaining agreement between the Respondent and the Steelworkers Union, effective by its terms from October 16, 1999 to October 15, 2004, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. At all material times, the Steelworkers Union, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative of the unit described in that collective–bargaining agreement.

The collective-bargaining agreements described above between the Respondent and the Unions both require that the Respondent provide medical benefits to the bargaining unit employees. On or about March 1, 2003, the Respondent changed the contractual medical benefits described in the collective-bargaining agreements unilaterally and without the Unions' consent. The subject set forth above relates to terms and conditions of employment of the employees in the units described above, and is a mandatory subject for the purposes of collective bargaining.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the Machinists Union and the Steelworkers Union as the exclusive collective-bargaining representatives of separate units of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and 8(d) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has failed to adhere to the medical benefits provisions of the collective-bargaining agreements, we shall order the Respondent to adhere to those contract provisions and to reimburse unit employees for any expenses ensuing from the Respondent's changes to the medical benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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vided herein is troubling because, if true, it suggests that the Board's decision may have no practical significance. However, there is nothing before the Board to show that a liquidation has taken place and that there are no assets. He also finds that *San Bernadino Dental Group*, 302 NLRB 135 (1991) does not support former counsel's contention that a Chapter 7 Trustee has no obligation to respond to a complaint. In *San Bernadino Dental Group*, the complaint was filed against a bankruptcy trustee alleging that the *trustee's* actions were unlawful. The Board held that the trustee was not authorized to operate the business and therefore did not violate the Act by failing and refusing to bargain with the union. In the present case, the complaint alleges that the trustee is responsible for remedying the alleged unfair labor practices, all of which are alleged to have occurred prior to her appointment. *San Bernadino Dental Group* does not deprive the Board of its authority to act under these circumstances. Cf. *Wheels Transportation Services*, 340 NLRB 1085 (2003) (trustee having authority to continue business is alter ego and properly a respondent).

ORDER

The National Labor Relations Board orders that the Respondent, Fulton Bellows & Components, Inc., Knoxville, Tennessee, and its trustee in bankruptcy, Ann Mostoller, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to abide by the terms of the collective-bargaining agreements with the International Association of Machinists and Aerospace Workers, Local Lodge 555 and United Steelworkers of America, Local Lodge 5341 by changing the medical benefits of its unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Abide by the terms of the collective-bargaining agreements with International Association of Machinists and Aerospace Workers, Local Lodge 555 and United Steelworkers of America, Local Lodge 5341 by restoring the contractual medical benefits.

(b) Make employees whole for all increased cost to them for medical benefits in excess of their costs under the contractual medical benefits plan, including expenses incurred as a result of the change in medical benefits, with interest, in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay or costs due under the terms of this Order.

(d) Within 14 days after service by the Region, duplicate and mail, at its own expense, and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"[4] to the Unions and to any unit employees who were employed by the Respondent on or after March 1, 2003.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. November 8, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LABOR LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to abide by the terms of the collective-bargaining agreements with the International Association of Machinists and Aerospace Workers, Local Lodge 555 and United Steelworkers of America, Local Lodge 5341 by changing the medical benefits of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL abide by the terms of the collective-bargaining agreements with International Association of Machinists and Aerospace Workers, Local Lodge 555 and United Steelworkers of America, Local Lodge 5341 by restoring the contractual medical benefits.

WE WILL make our unit employees whole for all increased cost to them for medical benefits in excess of their costs under the contractual medical benefits plan, including expenses incurred as a result of the change in medical benefits, with interest.

FULTON BELLOWS & COMPONENTS, INC.